ISSN 2455-4782

INTERNATIONAL HUMANITARIAN LAW AND CONFLICT VARIATIONS: HEEDING TO THE VOICE OF HUMANITY

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ABSTRACT

This article examines the different variants of conflict, the traditional conceptions and nomenclature used in describing them and the exclusion by traditional humanitarian law of these conflicts from its regulatory ambit. The doctrinal methodology was adopted examining the views of renowned scholars of the law of armed conflict, and primarily examining modern International Law treaties. In its findings, it was observed that International humanitarian law and indeed international law is "State centric" premium is giving to the protection of State sovereignty and territorial integrity than any other thing else which is a far cry of what institutions and law ought to be. There cannot be States without people. Indeed, states are a collection of human beings and like the declaration of the international military tribunal in Nuremberg, States are abstract entities. It is therefore to advance the course of humanity above abstractions like States, the recommendation of this article is hinged on.

Keywords: Conflicts, Variants, Humanity, States, International Humanitarian Law

INTRODUCTION

As a Medical Doctor, David Livingstone went to one of the war-torn countries to administer, not just medicines but also to distribute bread among the victims of war. As he was doing this to a little boy, the little boy looked into the eyes of the young doctor and said "sir, could you please give me medicine so I could never feel the pain of hunger again?" and the young doctor broke into tears.[1]Oh! The unimaginable consequence of war, of armed conflict or any other form of violence!

Unfortunately, it appears that armed conflicts have become a part and parcel of human existence. Indeed, many scholars have consistently maintained this position and one seems to wonder if that is so, why research to find ways to address root causes of conflict? Perhaps it is to reduce to its barest minimum their occurrences not necessarily to completely eradicate it. Complete eradication is simply a farce and a fiction void of realistic consideration of the fallibility of man.

The phrase "armed conflict" has different variants. In the bid of determining whether or not it should be regulated, the regulatory ambit of international law during armed conflict have defined clarified these variants, all in the bid of excluding or including such conflict situations from the regulatory ambit of the law. From the evolution and application of international humanitarian law mere acts of rebellion had to be distinguished from insurgency, belligerency, war and the contemporary concept of armed conflict. This paper seeks to reveal the futility of all these nomenclatures if IHL is going to stand the credibility test as her major principle and philosophy is humanity. The question is, does humanity knows any bounds and nomenclature? Is humanity reduced because a conflict does not attain a particular threshold of intensity? Should IHL sacrifice the principle of humanity on the altar of State sovereignty and territorial integrity? this article seeks to answer these questions. To this end, this article is structured as follows: part one examines the concept of humanitarianism in international humanitarian law, the history and evolution of international humanitarian law. As a branch of public international law the fulcrum of international law is the concept of state sovereignty and territorial integrity, thus part two of the article will be dedicated to exploring that concept in the light of humanitarianism. Part three will examine the various nomenclatures of conflict situation from

[1]D. Yacouba, 'Assistance to Migrants in the South of Senegal' MAG Humanitarian ICRC Magazine (Geneva August 23 2012) 16.

the traditional international law concepts to modern international law concepts of armed conflict. Part four will focus on the futility of modern IHL's classification of conflicts and her bid to exclude other forms of violence. This is to ensure that IHL heed more to the voice of humanity.

HUMANITARIANISM IN INTERNATIONAL HUMANITARIAN LAW

International humanitarian Law is "the body of international Law: conventions and customary rules, which are specifically intended to regulate humanitarian problems arising directly from both International and non-international armed conflicts, and which restrict for humanitarian reasons, the right of parties to the conflict to use means and methods of warfare of their choice and to protect people and objects affected by the conflict"[2]. The foremost philosophy of international Humanitarian Law is the concept of humanitarianism in war. IHL prioritizes the preservation of humanity above all else, the mitigation of suffering and her devotion to human welfare during armed conflict. Accordingly, IHL forbids the causation of unnecessary suffering including unnecessary damage to property[3]. The Hague Regulations[4] expresses one of the foremost aims of IHL, which is to alleviate the hardship and misfortune occasioned by war[5]. This foremost aim also known as the dictate of humanity is adumbrated in the rules which seek to protect those who no longer take part in armed hostilities as well as the rules governing means and methods of warfare[6]. According to this principle, the taking of hostage, the proliferation of terror among the civilian community, the damaging of infrastructure necessary for civilian communal life and acts inimical to the sustenance of the civilian population could be considered "inhumane" means of warfare.

Just like any building is built on a foundation, IHL like every other branch of International Law is founded on certain fundamental principles or theories. These principles guide the interpretation and application of the rules of IHL as they inspire the content of IHL treaties. They include the principle of humanity, distinction, necessity, proportionality etc.

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[2] H. P. Gasser, *International Humanitarian Law – An Introduction, In HAUG (Hans) Humanity for All* (Geneva: Henry Dunant Institute 1993) 509.

[3] Among the First expressions of the principle is the St. Petersburg Declaration of 1868.

[4] Article 23 (e) Hague Regulation 1907.

[5] F. Kalshoven and Z. Liesbeth, *Constraints on the waging of War: An Introduction to International Humanitarian Law* (Geneva: ICRC 2001)12.

[6] Thus, a party cannot use starvation as a method of warfare, or attack, destroy, remove or render useless such objects indispensable to the survival of the civilian population.

First, is the principle of humanity forbids the causation of unnecessary suffering including unnecessary damage to property[7]. The Hague Regulations[8] was the first and foremost legal instrument that adumbrates the fundamental aim of IHL which is to reduce human suffering occasioned by war.[9] This phenomenon objective also known as the principle of humanity, is also encapsulated in subsequent IHL laws which is aimed at protecting those who do not directly and actively participate in hostilities as well as regulating the means and methods of warfare.[10] By this principle, the act of poisoning water wells, streams or rivers which are necessary to the sustenance of lives as a method of fighting is regarded as "inhumane" means of warfare.

Pictet's[11] description of the principle of humanity is instructive: "capture is preferable to wounding an enemy, and wounding him is better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible." It is the researcher's view that Pictet's position has essentially captured what humanity in war should be and very relevant to substantiate this thesis.

According to the founding fathers of this principle, Jean-Jacques Roussseau and Martins:

> War is in no way a relationship of man with man but a relationship between states, in which individuals are enemies only by accident; not as men, nor even as citizens, but as solders since the object of war is to (sic) destroy the enemy state, it is legitimate to kill the latter's defenders as long as they are carrying arms, but as soon as they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives.

The principle of humanity was further elaborated on by Martins in what is known as "Marten's clause" which states that "civilians and combatants remain under the protection and authority

[7] St. Petersburg Declaration of 1868.
[8] Hague Regulations 1907, Art. 23 (e).
[9] F. Kalshoven, and Z. Liesbeth, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Geneva: ICRC, 2001)12.
[10] Hague Regulations 1907, Art. 23 (e) .
[11] J. Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht/Geneva: Martinis Nijhoff and Henri Dunant Inst, 1985) 62.

of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."[12]

This is so especially in cases not dealt with by treaties and traditional customary international law. As a major fundamental principle of IHL which inspires existing rule and influences the interpretation of IHL treaty laws, it is also known as the "elementary considerations of humanity".[13] Together with the marten's clause, they stipulate that protection of war victims is not subject, exclusively on the existing treaty rules. Today these clauses have become part of customary international law. But how can one apply these principles practically on the battle field in world of varied cultural and religious traditions with people of diverse interests and history?

The principle of distinction is considered the keystone of IHL and the first test to be applied during armed conflict; it requires that distinction must at all times be made between "military" and "civilian" persons and objects and prohibits haphazard and direct attacks against civilian objects. It only permits attacks directed at military persons, objects and objectives. Therefore, the targeting of oil pipelines, abduction of unarmed civilians is prohibited. Established by the authors of Petersburg Declaration, it is provided for in the 1977 Additional Protocols.[14]It states thus "The parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilians' objectives and military objectives and accordingly shall direct their operations only against military objectives".

The principle of necessity states that "considering that the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men." According to Hampston, "Military necessity is a legal concept used in IHL as part of the legal justification for attacks on legitimate military targets that may have adverse, even terrible, consequences for civilians and civilian objects". It means that the ultimate goal of the armed force must be

[12]The clause was first introduced based on a compromise proposal by the Russian delegate at the 1899 Hague peace conference into the preamble of Hague Convention no. 11 of 1899 and appears now in the preamble of Hague Convention No IV of 1907 and of the 1980 UN Weapons Convention on prohibitions or Restrictions on the use of certain conventional weapon and in GC I-Iv, Arts 63, 62, 142, 158 respectively (concerning the consequences of a denunciation) and in P.1, Art, 1(2), P.11, preamble, para. 4 contain similar wordings.

[13] A phase first used in the Nuremberg judgment of the Nazi war criminals and the international Court of Justice in the *Corfu channel* case judgment of April 91949, ICJ Report, 1949 p.22.

[14] Article. 48, Additional Protocol 1 (1977) and Article 13, Additional Protocol 11 (1977).

borne in mind when planning and launching an attack against the opposing force and such attacks must not exceed the military goal.[15]

The concept of military necessity acknowledges the imperative of winning a battle although that necessity must not be in contravention to other ideals of IHL.[16] The imperative of military gain must not be given a broad interpretation, but must be put in perspective with other requirements of IHL anything less will ultimately defeat the purposes of IHL which requires that military necessity must be balanced by the principle of humanity and the dictates of moral conscience. In evaluating this concept of military necessity and to put it in proper perspective against the backdrop of other relevant ideals of IHL, three major limits are placed on the arbitrary use of "military necessity":

1. The attack must be intended and directed towards overcoming the enemy. Any attack that is not directly related to the purpose of defeating the enemy is not justifiable.

2. Even an attack aimed at the military weakening of the enemy must not cause harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated.

3. Military necessity cannot justify violation of the other rules of IHL.

This principle was first articulated in the Lieber Code,[17],revealing the fact that "use of force is only justified to the extent it is necessary to achieve a defined military objective", and thus by this principle, any action or attack that has no direct bearing on military purpose of the armed force is prohibited.

Sassoli so aptly states that "IHL is a compromise between humanity and military necessity, a compromise which cannot always satisfy humanitarian agendas, but which has the immense advantage that it has been accepted by states as law that can be respected, even in war."[18]

This principle is also contained in the Fourth Hague Convention[19]. Having noted the importance of this principle in the conduct of hostilities, we submit that it must not be justified in the face of other rules of international humanitarian law.

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[15] F. Hampson, Crimes of War: Millitary Necessity'. <http://www.crimesofwar.org/a-z-guide/military-necessity/ >Accessed 10 September, 2011.

[16] *Ibid*

[17] Lieber Code, 1863, Art. 14.

[18] M. Sassoli, "The Implementation of International Humanitarian Law: Current and Inherent Challenges" In TLH Mc Cormack (ed.),*Yearbook of International Humanitarian Law* [2009] 45.

[19] Hague Convention IV. 1907, Art. 23(g)..

The principle of distinction also includes the sub principle of proportionality. In the context of civilian objects, Article 57(2)(a) (iii) and 57(2)(6) express its requirements to the effect that "those who plan or decide upon an attack must not launch any attack which may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[20] The Additional Protocol further provides that "an attack shall be cancelled or suspended if it becomes apparent that the objective is not military or that the damage to civilian objects would be excessive in relation to the concrete and direct military advantage expected."[21]

A similar prohibition is contained in Article 51 (5)(b) vis-à-vis injury or death to civilians[22]. It states that among others, "that the following types of attacks are to be considered as indiscriminate: an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

This Purpose of the principle proportionality is to maintain a balance between two sacrosanct, valid and divergent interests: 'the consideration of military need" and "the requirement of humanity." Which, according to Marco, Sassoli are "valid at all times, in all places, and under all circumstances, binding even states that are not parties to the conventions because they reflect and express the usage of peoples". These principles have therefore crystalized into customary international law.

All these principles are established in a bid to heed the voice of humanity in war. That notwithstanding, IHL remains a branch of public international law whose foundation is the protection of "state sovereignty and territorial integrity" the question now is, how do we balance both competing demands: humanity and the protection of state sovereignty and territorial integrity. To this we will now turn.

STATE SOVEREIGNTY AND TERRITORIAL INTEGRITY

The concept of State sovereignty and territorial integrity has remained the fulcrum of international law. According to free online legal dictionary,[23] Sovereignty is "the supreme,

[20] Additional Protocol I, 1977, Art. 57(2) (a) (iii).
[21] Additional Protocol I, 1977, Art. 57 (2) (b).
[22] Additional Protocol I 1977, Art. 57 (1)
[23] Legal Dictionary<http://legal-dictionary-thefreedictionary.com.> Accessed 15 August, 2018.

absolute and uncontrollable power by which an independent State is governed and from which all specific political powers are derived; the international independence of a State, combined with the right and power of regulating its internal affairs without foreign interference." According to Shaw, international law is founded upon the concept of "State" which in turn is founded on the notion of sovereignty. International law evolved from the foundation of the "exclusive authority of the State" over her internal affairs. This is the most outstanding characteristics of a State-its Sovereignty and independence. The concept of Sovereignty was incorporated in the Draft Declaration on the Rights and Duties of States 1949 as "the capacity of a State to provide for its own well-being and development free from the domination of other states, providing it does not impair or violate their legitimate rights." Generally, sovereignty encompasses a host of rights and duties which according to Shaw[24] includes the duty not to "intervene in the internal affairs of other sovereign States". This duty was also encapsulated in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States adopted in October 1970.

Accordingly, the duty of States encompasses the prohibition against rendering any support or aid to armed groups, aimed at violent dethrone of the government of a state.[25] According to the decision in Corfu channel case, "respect for territorial sovereignty is an essential foundation of international relations."[26]

However, Shaw emphasized that there is an ongoing debate as to what constitute "the internal affairs of a state" stating that it is an ever evolving and changing standard. For example, the protection of human rights, whether during war or at peace time has become a subject that defies the traditional conception of State sovereignty**.** Article 55 and 56 of the United Nations Charter confers certain rights on states to collectively see to the protection of human rights. It reads "All members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55." Article 55 provide for "universal respect for, and observance of, human rights and fundamental freedoms for all…" Thus Pellet[27] is of the view that state sovereignty must be interpreted in the light of general principles of international law, placing certain limits on the concept. For the purpose of this Article, pellet's and Shaw's analysis of the concept of state sovereignty with particular

[24] M. Shaw, *International Law* (Cambridge:Cambridge University Press 2005) 190
[25] M. Shaw*(n.* 24*)*
[26] International Court of Justice Report, 1949
[27] A. Pellet, 'State Sovereignty and the protection of Fundamental Human Rights: An International Law Perspective' <http://www.pugwash.org/reports/rc//pellet.htm.> Accessed 14 July, 2018.

emphasis on its exceptions would guide the discourse of issues surrounding the applicability of IHL to internal conflicts. This article submits that, this concept if interpreted strictly, clouds the provisions of IHL and it has proven to be a stumbling block in the protective aim of IHL in conflicts of an internal character.

Conflicts are in different versions and international law has responded to these variants in different ways but this article highlights the need to heed the voice of humanity in determining the applicability if IHL in conflict however its form. To this we will now turn.

CONFLICT VARIANTS

(i) Rebellion

The concept of rebellion in traditional international law refers to situations of short-lived insurrection against the authority of a State.[28] Note the term "short-lived" which also implies "brevity" as a result of its nature-brevity, situations of rebellion was considered to be completely beyond the remit of international humanitarian concern.[29] Consequently, rebels challenging the *de jure* government during rebellion were not protected under traditional international law. As opposed to insurgency and belligerency, Richard Falk posit that "a situation of rebellion was to be understood as a sporadic challenge to the legitimate government, whereas insurgency and belligerency are intended to apply to situations of sustained conflict"[30]. Such situation manifests themselves as violent protest or an uprising that is so rapidly suppressed as to warrant no acknowledgement of its existence on an external level.[31] In traditional international law such situations are characterized as short-lived, sporadic threat to the authority of a state and are not under the remit of International Law. The reason for such exclusion was explained by the international criminal Tribunal for the Former Yugoslavia thus:

…the lack of provision in traditional international law relating to situations of rebellion was partially because of the fact that states preferred to regard it as coming within the purview of

[28]R. Falk, 'Janus Tormented', in Rosenau (ed), *International Aspects of Civil Strife* [Newyork: Princiton University Press, 1964], cited in A. Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law [Cambridge, Cambridge University Press, 2010] 8

[29] R.P. Dhokalia, 'Civil Wars and International Law' [1971] (11) *Indian Journal of International Law*

[30] Falk (*n*. 28)

[31]*Ibid*

national criminal law and, by the same token, to exclude any possible intrusion by other states into their own domestic jurisdiction[32]

The above is also the spirit underpinning modern international law. International Humanitarian law in Article 1(2) of the Additional protocol 2 provides for this exclusion. Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature are clearly not within the remit of international humanitarian law for the same reason it was not under traditional international law or the laws of wars. By analogy, traditional Human rights law also took this route but has been modified to whittle down the doctrine of state sovereignty in situations of human right violation hence we now have international protection of human rights as opposed to national protection. This Article posits that if human rights protection could evolve, why not international humanitarian law?

With respect to status of these rebels in traditional international Law, Wilson states that:

> The rebels have no rights or duties in international law…under traditional international law a rebellion within the borders of a sovereign State is the exclusive concern of that State. Rebels may be punished under municipal law and there is no obligation to treat them as prisoners of war…because rebels have no legal rights and may not be legitimately assisted by outside powers, traditional international law clearly favours the established government in the case of rebellion, regardless of the cause for which the rebels are fighting[33]

From the foregoing, rebels in traditional international law had no rights but they also had no duties in international law. However, the case in modern international law is the imposition of duties without rights. Common article 3 provides that "parties to the conflict shall be bound to apply, as minimum, the provisions of the convention" meanwhile the last paragraph of that article provides that the application of the provisions shall not affect the legal status of the parties to the conflict.

Although, the absence of legal rights for insurgents in situations of rebellion helped to ensure non-interference in the internal affairs of sovereign states, it is argued that from the humanitarian point of view, not to the advantage of securing justice for those involved in the

[32] Tardic Case No IT-94-1-AR72, para 96
[33] H. Wilson, International Law and the use of force by liberation Movements [Oxford: Clarendon Press, 1988) 23-24

rebellion[34] especially where they are fighting a just cause like the Niger-Delta Militants and the Independent Peoples of Biafra in Nigeria even though the crisis in that region is far from being a rebellion because it is not short-lived.

When government fails to suppress a rebellion, the status of the conflict would shift to insurgency.[35] This shift to insurgency allows for the possibility of insurgent recognition in traditional international law thereby providing a window for the application of international humanitarian law norms. To this we will now turn.

(ii) ***Insurgency***

When a rebellion survives suppression, it changes status to a situation of insurgency. The concept of insurgency is ambiguous as it lacks precise definition in international law.[36] This ambiguity has allowed for the definition of the concept subject to manipulation of States to suit their whims and caprices. However, scholars and institutions have attempted to define and describe the concept. Falk describes insurgency as a sustained and substantial intrastate violence[37]The United State Department of Army [38]defined and described insurgency thus:

An insurgency is an organized and political struggle whose goal may be the seizure of power through revolutionary take over and replacement of existing government. In some cases, however, an insurgency goal may be more limited. For example, an insurgency may intend to break away from government control and establish an autonomous ethnic or religious territorial bound. The insurgency may also only intend to extract limited political concessions unalterable through less violent means...

It is seen as a form of armed uprising against an incumbent government. There have been a number of insurgent uprising all over the world. Nations like Afghanistan, Algeria, Philippines, Sirianka, Sudan, Thailand and Nigeria have witness certain sort of insurgencies. In international law, insurgencies are not terrorist unless they employ terrorist tactics. According

[34] Cullen,(*n*. 28)
[35]*Ibid*

[37] Falk, (*n*. 28).
[38] Ford, C. 'of shoes and sites: Globalization and insurgency' Military Review (May-June 2007) https://www.armyupress.army.mil Accessed.23 July 2018.

to Erik, "recognition of insurgency means acknowledgement of the existence of an armed revolt or an internal war".[39]

Whenever that happens, it indicates that the "recognizing state" regards the contestant as legal contestant and not rebels[40]Thus whenever a rebellion survives suppression, its status changes to that of insurgency.[41] On the other hand whenever such rebellion is short-lived, a sporadic challenge to the legitimate government such situations are beyond the remit of international humanitarian law.[42] According to Erik Castein, recognition of insurgency means acknowledgement of the existence of an armed revolt of grave character and the incapacity, at least temporarily, of the lawful government to maintain public order and exercise authority over all parts of the national territory. According to Heather[43] in traditional international law, there is no requirement for the degree of intensity of violence, the extent of control over territory, the establishment of quasi-governmental authority, or the conduct of operations in accordance with any humanitarian principle as propounded in modern international humanitarian law. All that is needed for the recognition of insurgency is necessity depending on the interests of either the *dejure* government or a third state. The applicability of humanitarian norms in this situation depends on recognition[44] either by the *dejure* state or a third state. This indeterminate scope of insurgency according to Cullen, allows for manipulation by states wishing to define their relationship with insurgents.[45] Thus in traditional international law, the concept of insurgency does not automatically necessitate the application of humanitarian norms. The *dejure* government have no obligation to adhere to humanitarian norms except otherwise agreed. Thus, any legal protection available to insurgents would be derived from the municipal law.

However, International law has evolved to require the application of the law of armed conflict in all situations of insurgency although subject to the threshold criteria in Additional Protocol

[39] Cullen *(n. 28*): J. O'Brien, 'The Jus in bello in Revolutionary War and counter-Insurgency' [1978] (18) *Virgina Journal of International Law*, 193: P..Meron, 'Recognition of Belligerency and Insurgency' in P.K. Meron (ed.) *The Law of Recognition in International Law: Basic Principles* (New York: Edwin Mellon Press, 1994) 109

[40] H. Noelle, 'The Application of International Humanitarian Law to Wars of National Liberation' [2004] *Journal of Humanitarian Assistance,* 88.

[41] *Ibid*

[42] Faulk Richard (*n. 28*)

[43] H. Wilson, *International Law and the use of Force by Liberation Movements* [Oxford: Clarendon Press, 1988) 23-24

[44] *Ibid.*

[45] Cullen (*n*.28)

2. Thus, contrary to traditional international law, the existence of insurgency is now recognized as triggering the applicability of international humanitarian law subject to certain conditions known as "threshold" Why? The ICTY appeals chamber gave the reasons thus:

1. Civil wars have become more frequent
2. Internal conflicts have become more and more cruel and protracted
3. Large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community
4. The Impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the universal Declaration of Human Rights in 1948
5. A state-sovereign-oriented approach has been gradually supplanted by a human-being oriented approach[46]

This Article is premised on the human-being approach to international humanitarian law in further lowering or completely eradication of the threshold criteria contained in Additional Protocol 2. Then IHL can be a real credible instrument in protecting human dignity in all conflict situations. Humanity knows no bounds or threshold. States are failing in the duty to restore order and the brunt of hostilities is continually born by innocent civilians.

(iii) *Belligerency*

In traditional International Law, the only form of internal conflict that triggers the unequivocal application of the laws of war is one involving a state of belligerency or civil war. The state of Belligerency occur when the party in the rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against the former sovereign.[47] This kind of conflict, in order to be recognized in traditional international law, must possess the material characteristics on conventional warfare between two sovereign states. According to the United States Supreme Court, "when the regular course of justice is interrupted by revolt, rebellion, or insurrection that the course of justice cannot be kept open, civil war exists and hostilities may

[46] Tardic Case No. IT-94-1-AR72, para. 97
[47] Cullen *(n.*28)

be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land.[48] Again in *Williams v Bruffy*[49]The court referred to the conditions that underlie recognition of belligerency as when a rebellion becomes organized and attains such proportions to be able to put a formidable military force in the field, it is usual for the established government to concede to it some belligerent rights. According to the court, such concession is made in the interest of humanity, to prevent the cruelties which would inevitably follow mutual reprisals and retaliation. The dictates of humanity here come to play in the decision of the court even though at that time terms like "law of armed conflict" and "international humanitarian law" did not exist. The court further explains that although belligerents' rights are rights which exist only during war they could be accorded to belligerents upon the consideration of justice, humanity although the policy of government also comes to play.

It must be noted that the recognition of belligerency could only be conferred by a state once the conflict had reached a certain threshold of intensity manifesting in a situation similar to that of a war between states[50]. Belligerence status was in traditional international law a question of fact presupposing the existence of a *defacto* governmental authority in conflict with that of a *de jure* government. And it is expected that the belligerents be afforded recognition before the obligations under the laws of war could be said to exist.[51] According to Lindsay, non-recognition of belligerency often led to barbaric conduct by both sides to the conflict.[52] And recognition of belligerency was the only institution in traditional international law that necessitated the application of laws of war to situations of internal conflict. There are four criteria for the recognition of belligerency. Hersch Lauterpacht enunciated them as follows[53]:

First, there must exist within the State an armed conflict of a general character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which

[48] R. Oglesby , 'The Decline of Recognition of Belligerence: Deseutude in International Law' in Roscoe R(ed) Internal *Law and Search for Normative Order* [The Hague: Martinus Nijhoff, 1971] cited in Cullen *(n.*28)
[49] [1877] 96 US Supreme Court, 176
[50][1877] 96 US Supreme Court, 176
[51] M. Lindsay, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed conflict [1998] (47) *ICLQ* 337
[52]*Ibid*
[53]H. Lauterpacht, 'The Problem of the Revision of the Law of War' [1952] (39) BYBIL 176 cited in Cullen, (*n.*28):

make it necessary for outsider States to define their attitude by means of recognition of belligerency.

In Cullen's view, the first condition refers to the scale of hostilities and required that the character of the conflict is similar to that of an international war.[54] The second condition stating that the insurgent force must "occupy and administer a substantial portion of national territory" implies the existence of a quasi-governmental authority controlled by insurgents. The third condition necessitates the insurgent's adherence to laws governing the conduct of hostilities, ensuring respect for humanitarian norms and the fourth condition appears political.

Where these conditions are met, traditional international law requires that parties be treated in essentially the same way as states at war. With recognition of belligerency, insurgents acquired the same rights and duties as a party to an international war[55]

It appears that the application of humanitarian norms under traditional international law in belligerent situations was contingent not only on meeting the above threshold or criteria, but also on the willingness of states to recognize it as such.[56] Controversy abounds as to whether state's recognition was important in the determination of belligerency; Falk argued that if the four conditions were met, states had no right to refuse recognition.[57] On the contrary, David was of the opinion that recognition of belligerency was an "act of unfettered political discretion".[58] However another view is that if a third government so recognize the belligerency, it could be termed so. Thus, recognition could be either by the *dejure* government or by a third State[59].other controversy surrounding the recognition of belligerency included the extent of territorial control required, the question of what constitute "responsible authority" and the nature of circumstances deemed to necessitate the act of recognition for third states.[60]

That notwithstanding, the doctrine has declined at the point where recognition of belligerency is almost unknown today. It however provides a historical conceptualization of contemporary

[54] Richard (*n*. 28)
[55] Cullen, (*n*.28)
[56] *Ibid.*
[57] Richard (*n*. 28)
[58] D. Elder , 'The Historical Background of Common Article 3 of the Geneva Conventions of 1949' [1979] (11) *Case Western Reserve Journal of International Law*, 206.
[59] Cullen (*n*.28) 23.
[60] *Ibid.*

armed conflict as regulated by modern international law in the form of the Geneva conventions and its additional protocols[61]

(iii) War

According to Black's law Dictionary, "war is a hostile conflict by mean of armed forces carried on between states, nations or rulers, or sometimes between parties within the same nation or state"[62]. This definition appears to be broad and covers a wide spectrum of violent situations. However, for the purpose of IHL, certain features must be present in other for a conflict situation to amount to an armed conflict. And such features are provided for by the law itself. The term "war" was being used in antiquity to describe a situation of conflict between Nations as declared by a State involved.[63] However, with the coming into force of the 1949 Geneva Conventions, the word "armed Conflict" was introduced into the text as a replacement of the word "war" to remove the subjective element (of state declaration) in the determination of what would otherwise be known as "war". According to Sylvian, "through this semantic contribution, those who drafted those instruments (the 1949 Conventions) wanted to show that the applicability of IHL was henceforth to be unrelated to the will of government".[64] By the promulgation of 1949 Convention, the determination of armed conflict would be based on the existence of certain specific factual conditions.

(IV) *Armed Conflict*

There are no definitions of the concept of "armed conflict" in treaty law, especially the modern ones like the Geneva Conventions or Protocols. It is generally agreed that "any difference arising between states and leading to the intervention of members of the armed forces is an armed conflict" Typically, an armed conflict exists "whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups within a state"[65]. The Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia stated that "an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and

[61] The strict criteria governing the recognition of belligerence, together with its high threshold of application were considered in the drafting of common Article 3 to the Geneva Conventions

[62] B. Garner, (ed.) Blacks Law Dictionary.

[63] V. Sylvian, 'Typology of Armed Conflict in International Humanitarian Law: Legal Concepts and Actual Situations' [2009] (92) *International Review of the Red Cross* 72.

[64] *Ibid*.

[65] J. Pictet, *Commentary on the Geneva Convention of 12 August 1949* (Geneva: ICRC 1952), 29.

organized armed groups or between such groups within a state"[66]. There are basically two types of armed conflict- International and non-International armed conflict and a third; Internationalized armed conflict.

The International Criminal Tribunal for the former Yugoslavia defined the concept "armed conflict" in its decision in *DuskoTardic* case[67] "A conflict exists whenever there is a resort to armed forces between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state". Art 1 (2) of Additional Protocol 2 to the Geneva Conventions distinguishes armed conflicts in this context with other situations of violence such as "riots, internal disturbances and tensions, isolated and sporadic acts of violence and other acts of a similar nature", commonly referred to as "other situations of violence (OSV), with the latter not within the meaning of armed conflicts and not within the remit of the application of international humanitarian law.

MODERN IHL AND THE VOICE OF HUMANITY

Modern IHL is replete of provisions tainted with the principle of state sovereignty, hence many authors have adjudged it overtly "state centric". For example in the determination of non - international armed conflict, the lex lata of IHL places too much emphasis on States. For example Additional Protocol 11, Article 3 (1) leaves us with the question of how to foresee a situation where state will willing recognize the "existence of an armed conflict" within her with the full implication of such recognition. The uncertainly is further heightened by the inclusion of the rule of "non-interference" in Art.3 (2) of AP 11, making objective determination of armed conflict an illusion. Attempt to clarify the threshold that an internal conflict must reach according to AP 11 is also problematic because of the inclusion of State recognition in article 3(1) and (2). The 'statist' spirit that surrounds the Convention seems overwhelming. Here is how it is reflected in the protocol:

Article 3(1) and (2) provides:

Nothing in this protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government by all legitimate means to maintain or re-establish law

[66] *Tadic Case*, IT-94-1, Decision on Jurisdiction, Para 70; 105 ILR, pp. 453, 488.
[67] *Prosecutor v. Tardic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) case no. IT-94-AR 72 (2 October 1995).

and order in the State or to defend the national unity and territorial integrity of the State. Yet IHL claims to heed first and foremost to the voice and demands of humanity. The provisions on state sovereignty, thresholds of conflicts especially as it relates to internal armed conflicts and provisions of non intervention, whatsoever in the territorial integrity of a state seems to negate this claim. In an era where the protection of human lives and rights supersedes principles protecting abstract entities as "states" in international legal order as heralded by international protection of human rights, IHL stands at the crossroad or either sticking to the old order or evolving to meet these circumstantial realities if she must hold firmly her fundamental principle of humanity.

THE WAY FORWARD: FUNDAMENTAL STANDARDS OF HUMANITY OBSERVABLE IN ALL VARIANTS OF CONFLICT

In view of the alarming increase of intra-state armed conflicts in the world, otherwise known as OSV, it is certain that the rights of individuals caught up in this kind of conflict are in "danger of arbitrary deprivation"[68] to allay this fears, it is proposed that identification and consolidation of the fundamental principles of both IHL and IHRL be done which will be applicable in all variants of conflict, all times, to all actors, governmental, non-governmental and individuals. This will be known as fundamental standard of humanity and it is fleshed out by the "*Tukur* Declaration of Minimum Humanitarian Standards."

The move for the consolidation of fundamental principles of IHL and IHRL, started in the 1980s. It was inspired by the works of Meron who analyzed IHL and IHRL, bringing to light the inadequacy of these laws with respect to grey-zone conflicts which was increasingly on the rise and the blatant disregard of human rights of individuals caught in those kinds of conflicts[69] the hallmark of this call was the formation of the "1990 Declaration of Minimum Humanitarian

[68] T. Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' [1983] (77) *American Journal of International Law*, 589: GIAD Draper, 'Relationship Between ithe Human Rights Regime and the Laws of Armed Conflict' [1971] (1) *Israel year Book of Human Rights*, 198; B. Sang, 'Contemporary Conflicts and Protection Gaps in International Humanitarian Law: The Necessity and Practical Utility of Fundamental Standards of Humanity'[2015] *African yearbook on International Humanitarian Law*, i50.

[69] T. Meron, 'Towards a Humanitarian Declaration on Internal Strife' [1984] (78) *American Journal of International Law*, 859.

standards",[70] which was a byproduct of study of experts under the platform of "Institute for Human Rights at Abo Akademi University" in Turku Finland. In the preamble, it was stated that "IHL and IHRL do not adequately protect individuals caught up in situation of internal violence, disturbance, tensions and Public emergency."

The declaration contains 18 Article that provide for minimum humanitarian guarantees. They are: Provision against discrimination; Recognition of a person before the law; Prohibition of murder, torture, mutilate, rape; Prohibition of crime of "inhuman or degrading treatment or punishment"; Prohibition of "collective punishment"; Prohibition of "arbitrary deprivation of liberty"; Prohibited of forced displacement; Prohibition of conviction without trial; Inviolability of medical and religions personnel; Protection of humanitarian workers.

The legal status of this document is however declaratory and not binding because it was not adopted under the auspices of the United Nations nor was it in a treaty form. Most of the provisions of this declaration are similar to those in the ICCPR and Geneva Convention. However, it defers from the above because it is not subject to derogation nor is subject to the character of conflict it is applicable to all actors, individuals, group or State.[71]

In a bid to elevate its status to a binding legal document, the draft was sent to the Commission on Human Rights for further study, research and possibly adaption as a legal text. The commission, seeking greater participation transmitted the text to government and inter-governmental organizations for an approval.[72] All of these attempts were to get consent from experts with a view to adopting it as a treaty. However, the outcome was negative though re-affirming the need to identify fundamental standards of humanity, but contesting the need to advance the instrument to the level of legally binding declaration needless to say, a binding Convention.

It has become imperative that this instrument be consolidated and made formally binding if we must give credibility to IHL's claim to humanity.

[70] Declaration of Minimum Humanitarian Standards reprinted in UN Doc E/CN.4/sub.2/1991/155, revised in 1994, UN Doc E/CN4/1995/116.

[71] Declaration of Minimum Humanitarian Standards reprinted in UN Doc E/CN.4/sub.2/1991/155, revised in 1994, UN Doc E/CN4/1995/116: T. Meron, 'Towards a Humanitarian Declaration on Internal Strife' [1984] (78) *American Journal of International Law*, 859.

[72] Crawford 'Road to Nowhere? The Future for a Declaration on Fundamental Standards of Humanity [2012] (3) (1*) Journal of International Humanitarian Legal Studies*, 43, 53.

CONCLUSSION

The debate is still ongoing: consolidate the Abur turkur declaration as a binding treaty or not. This article has revealed the futility of excluding certain variants of conflict from the regulatory remit of International Humanitarian Law and has shown the bedrock of this exclusion: the principle of state sovereignty and territorial integrity. This article has succeeded in revealing the danger of holding firmly the principle of state sovereignty at the expense of preserving humanity even in the face of war. During the trials of war criminals of the second world war, the International Criminal Tribunal in Nuremberg, stated clearly, reaffirming the need to preserve humanity that "States are abstract entities…". This statement was made in the punishment regime of IHL, there is need for this philosophy to colour all treaty provisions of IHL or better still, advance the course for the consolidation of the Turku Declaration as a binding treaty. This will be a step in the right direction in advancing the course of humanity.